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SUPREME COURT, U.S.
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No. 89-1128

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

UNITED TRANSPORTATION UNION,

Petitioner,

-vs-

UNITED TRANSPORTATION UNION, LOCAL 74,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989
No. 89-1128

UNITED TRANSPORTATION UNION,

Petitioner,

vs.

UNITED TRANSPORTATION UNION, LOCAL 74,

Respondent.

BRIEF IN OPPOSITION

The Respondent, United Transportation Union, Local 74, respectfully prays that a Writ of Certiorari not be issued to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on July 31, 1989.

STATEMENT OF THE CASE

Local 74 filed the complaint in this action entitled Case No. C82-467, in the United States District Court on August 4, 1982. Local 74 alleged a breach of the union's duty of fair representation in that it acted arbitrarily and with hostile intent to deprive Local 74 of an equitable share of yard work in the merged Conrail system. This action is brought pursuant to the Railway Labor Act, 45 U.S.C. Section 151, et seq.

On January 30, 1986, the District Court granted the union's motion to strike the jury demand, and the case was tried to a court in February, 1986. The court issued Findings of Fact and Conclusions of Law and Judgment on July 29, 1988, finding that the UTU had not violated its duty of fair representation and that Local 74 had failed to exhaust its internal union remedies.

In an opinion entitled *United Transportation Union, Local 74 v. Consolidated Rail Corp.*, 881 F.2d 282 (6th Cir. 1989), the Sixth Circuit vacated the decision of the trial court and remanded the case holding that:

1. The local union had a right to a jury trial;
2. The local union was not required to exhaust internal union remedies; and
3. There was sufficient evidence from which a jury could have found a breach of the duty of fair representation.

Petitioner's motion for rehearing and rehearing *en banc* was denied on October 16, 1989.

SUMMARY OF ARGUMENT

I.

This case is not a hybrid action under the Railway Labor Act. This action was brought by former Erie Lackawanna Railroad employees who claim that their union breached its duty of fair representation when it failed to obtain a fair share of yard work for Local 74 after the Erie Lackawanna was merged into the Conrail system. As a result, the yard workers of Local 74 have suffered severe monetary damages, many of them facing financial ruin before this action was filed.

The instant case is one for damages sustained as a result of the union's breach only, and does not involve a claim against the employer for breach of contract. This case does not present the complicated problem of whether a right to a jury trial should obtain in a hybrid action where

legal and equitable claims involving both the employer and the union are closely interwoven, and where both legal and equitable relief are requested. This case adds nothing to the conflict in the circuits regarding the issue of whether a Seventh Amendment right to a jury trial exists in a hybrid action, and the right to a Seventh Amendment jury trial in this case should not be governed by the court's decision in *Chauffeurs, Teamsters and Helpers, Local 391 v. Terry*, No. 88-1719, argued before this Court on December 6, 1989.

II.

The appellate court found that there was a submissible jury issue as to whether the union breached its duty of fair representation in failing to act promptly to preserve the necessary data by which Respondent's claim for yard work could be

established. This conclusion is supported by ample evidence in the record from which a jury could conclude that not only did the union procrastinate when timely action was necessary to establish the Respondent's claim for yard work, but also that the union acted with a discriminatory and hostile intent to deprive the Respondent of a fair share of yard work in the merged Conrail system.

III.

The record in this case supports the Circuit Court's conclusion that there is evidence from which reasonable minds could find that the UTU had become hostile toward Local 74 in their pursuit of yard work in the merged Conrail system, at the time this action was filed. The record indicates that the union misled the railroad as to the status of negotiations regarding their

work equity. As a prerequisite for establishing their claim for yard work, the union officials also required Local 74 to perform the impossible task of gathering data which was no longer available due to the union's own procrastination. On these facts, the Circuit Court concluded that the Respondent should be excused from exhausting internal union remedies because to do so would be futile.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

THIS CASE PRESENTS THE ISSUE OF WHETHER A SEVENTH AMENDMENT RIGHT TO A JURY TRIAL EXISTS IN A PURE DUTY OF FAIR REPRESENTATION CASE, WHICH IS A FAR DIFFERENT ISSUE THAN WHETHER THE RIGHT TO A JURY TRIAL EXISTS IN A HYBRID SECTION 301 ACTION.

Petitioner contends that the instant case is the Railway Labor Act analogue of *Chauffeurs, Teamsters and Helpers, Local 391 v. Terry*, No. 88-1719, a hybrid Section 301 action under the National Labor Relations Act. While the developments in the law under the RLA have paralleled the decisions interpreting the NLRA, this case presents a far different issue than that in *Terry*.

The issue in this case is whether a right to a jury trial exists in a pure duty of fair representation case against a union, where there is no claim against an

employer for breach of contract and the relief sought is primarily legal in nature. See *United Transportation Union, Local 74 v. Consolidated Rail Corp.*, 881 F.2d 282 (6th Cir. 1989) (Petitioner's App. at 1a). It is the peculiar nature of a hybrid case, which combines a claim against a union for a breach of its duty of fair representation and a claim against an employer for a breach of contract, that has caused a conflict in the circuits over the issue of whether a per se rule characterizing the overall nature of the case as legal or equitable should be recognized in order to provide uniformity and predictability in such actions. While the Respondent is unaware of any case in which this Court has held that a policy of uniformity or predictability would outweigh the important constitutional right to a jury trial, this case does not raise those concerns.

The Respondent in this case is a group of former Erie Lackawanna Railroad employees who lost most of their jobs to former Penn Central workers after the railroads merged in 1976, leaving the Respondent without any share of the work at all. The Respondent in this case claims that various officers and representatives of the UTU engaged in a course of conduct, with hostile and discriminatory intent, to deny them yard work in the Conrail system and to keep their former yard jobs in the hands of former Penn Central employees who make up a post-merger majority within their union. They claim that these actions were taken in the face of clear and unequivocal language in their union constitution which requires the union's general committee to arrange for a fair division of work in the merged system. The record is replete with

testimony and evidence to support this claim.

The record shows that approximately 30 jobs were permanently diverted from the Marion yard to former Penn Central yards within days after the Conrail merger in 1976. It is not disputed that, under the terms of the union constitution, the former EL employees at Marion are entitled to their fair share of work in the merged system. Nonetheless, not a single yard job has been awarded to a former EL employee at Marion. Consequently, many of the EL yard workers have been forced at great expense and inconvenience to relocate their families or to give up many years of railroad seniority and to find other work while, at the same time, former Penn Central employees, many of whom have less railroad seniority, have, since the Conrail merger, benefited hugely at their expense.

For these wrongs, Respondent seeks compensatory damages in the form of moving expenses, legal fees, and other damages to their livelihoods directly caused by the intentional and discriminatory acts and omissions of their union. There is no allegation in this case that the employer participated in those acts.

As this Court stated in *Czosek v. O'Mara*, 397 U.S. 25 (1970), a claim against a union for a breach of its duty of fair representation is a discreet claim separate and quite apart from the right of an individual employee to pursue a claim against an employer for its breach of a collective bargaining agreement.

In *Czosek*, former Delaware Lackawanna Railroad employees were furloughed and never recalled to service after the merger of the Erie Railroad and the Delaware Lackawanna and Western Railroad. The

employees alleged that their union had been guilty of gross nonfeasance and hostile discrimination in arbitrarily and capriciously refusing to process the claims of employees who had been replaced by "pre-merger employees" of the Erie Railroad. This Court held that if the union had caused damage to the employees, independent from any claims for wrongful discharge by the employer, then a separate action would lie against the union and damages could be recovered for its breach of duty. *Id.* at 25-26.

The nature of a pure duty of fair representation claim can be distinguished from a typical hybrid action such as that presented by *Terry*. In a hybrid action, the claims of the employee against an employer and a union are often inseparable or hopelessly intertwined.. In *Terry*, for example, a group of Teamsters alleged that

their union and employer had acted together to deny them their rights, by engaging in a pattern and practice of layoff and recall procedures designed to give other drivers job preferences over them. *Terry v. Chauffeurs, Teamsters and Helpers, Local 391*, 863 F.2d 334 (4th Cir. 1988).

Not only are the factual allegations against the union and the employer in *Terry* entangled, but the remedies sought include a mixture of legal and equitable relief. In a case with such closely interwoven legal and equitable issues, where the employer and the union have acted together to cause an employee harm, it certainly imposes a burden on the trial court to require it to sort out the issues in order to determine whether or not an employee is entitled to a jury trial on either claim.

However, this Court clearly held in *Ross v. Bernhard*, 396 U.S. 531 (1970), that the Seventh Amendment right to a jury trial depends on the nature of the issue to be tried rather than the overall character of the action. The Court held that even an action, which traditionally was primarily equitable in nature, must be divided into its legal and equitable components in order to preserve the important constitutional right to a jury trial. *Id.* at 738.

Nonetheless, petitioner argues that the decision of the Eleventh Circuit in *Leach v. Pan American World Airways*, 842 F.2d 845 (11th Cir. 1988), should govern this matter. The *Leach* court decided that a per se rule characterizing the overall nature of a hybrid action was necessary to best serve the interests of labor law in uniformity and predictability. The court determined that the overall action was

equitable in nature because it basically resembled a claim for unfair labor practices. *Id.* at 289. Contrary to this Court's decision in *Ross*, however, the Eleventh Circuit held that since the overall hybrid action was equitable, neither claim against the employer or the union was triable to a jury. *Id.* at 291.

The *Leach* decision was based on the reasoning of this Court in *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), and *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), wherein this Court designated a uniform statute of limitations for both claims involved in a hybrid Section 301 action. Finding no adequate state law analogy to a hybrid Section 301 action, the Court chose the federal law analogy it found to be most appropriate, and adopted the six month limitation period for making

charges of unfair labor practices to the NLRB. 462 U.S. at 179.

The *DelCostello* court noted that while the claim against the employer was similar to an action to set aside an arbitration decision, calling for a very short statute of limitations, the action against the union was more akin to a legal malpractice action which would provide a much longer statute of limitations. *Id.* at 165-168. This Court determined that a uniform limitation of six months best served the policy of labor law calling for a rapid resolution of labor disputes. *Id.* at 168. The Court also noted that because the employer is usually responsible for the greater share of damages, it was not fair to allow the employer to escape under a shorter limitations period. *Id.* at 168.

In arguing that the policies of labor law would also mandate an overall

characterization of a hybrid Section 301 case for purposes of determining the constitutional right to a jury trial, the *Leach* court ignores the fact that a constitutional right is a far more weighty matter than the statute of limitations issue when balanced against the concerns of labor law for uniformity and predictability in a hybrid action.

Whether this Court decides on a per se characterization of the overall hybrid action or not, this case should remain unaffected by that decision in *Terry*. This case presents no web of tangled issues against a union and an employer. Instead, this case presents a pure unfair representation claim against the UTU for a discriminatory and hostile denial of a fundamental right guaranteed Local 74 by their union. Moreover, since the Circuit Court found that the relief sought by the

Respondent was legal in nature, this case presents a far more compelling Seventh Amendment right to a jury trial claim than does *Terry*.

Finally, there is no inconsistency, as UTU claims, between the appellate court's decision in *Wood v. Int'l Bhd. of Teamsters*, 807 F.2d 493 (6th Cir. 1986), or *Deringer v. Columbia Transp. Division*, 866 F.2d 859 (6th Cir. 1989) and the appellate court's decision in this case. Notwithstanding the petitioner's assertion to the contrary, the Sixth Circuit has consistently refused to adopt a per se rule that every duty of fair representation issue is legal or equitable. Petitioner's contention that either *Wood* or *Deringer* would mandate a finding that the duty of fair representation issue in this case constitutes an equitable claim, is merely a

mischaracterization of the court's holdings in those cases.

Wood is a classic Section 301 case in which a number of warehousemen sought to set aside an arbitration decision that neither their former employer or its successor was obligated under the prior employer's collective bargaining contract. The case was tried to a jury which found for the employees against the union and their former employer. On appeal, the Sixth Circuit never reached the issue of whether a jury trial was proper in a hybrid Section 301 action because the Court found, as a matter of law, that there had not been enough evidence to justify vacating the arbitration award. 493 F.2d at 504, n. 3.

In his dissent to the *Wood* decision, Judge Contie ventured his opinion that the duty of fair representation claim in that

case was erroneously tried to a jury. *Id.* at 504. His reasoning, as indicated by the opinion, was based on an analysis of the duty of fair representation issue, and not a per se characterization of the overall hybrid Section 301 action. That analysis is consistent with this court's decision in *Ross*.

Judge Contie also applied the factors for analyzing the nature of an issue as set forth in *Ross*:

1) the pre-merger custom with reference to such questions;
2) the remedy sought;
3) the practical abilities and limitations of juries. *Id.* at 538, n. 10.

Judge Contie then applied the law of this circuit in *Hildebrand v. Board of Trustees*, 607 F.2d 705, 708 (6th Cir. 1979), which recognizes the second *Ross* factor, the

nature of the remedy sought, as being the most significant. He found that the claim did not merit a jury trial because the relief sought was wholly equitable. 807 F.2d at 504.

The majority in *Wood* approved of Judge Contie's analysis of the jury trial issue but the court did not announce any per se rule regarding the character of a duty of fair representation claim in every case. The court simply found no need to reach that issue in *Wood*. *Id*. at 504, n. 3.

Deringer's hybrid Section 301 action was based on his complaint about his employer's construction of its seniority list, and upon his union's refusal to pursue his grievance. The *Deringer* court refused to apply a per se rule to determine whether Deringer had a right to a jury trial for his claim against the union. Instead, the court focused on the remedy sought by

Deringer against the union, and finding the only prayer for relief applicable to the union in the complaint to be equitable in nature, the *Deringer* court determined that the employee did not have a right to a jury trial. 866 F.2d at 863.

In this case the Sixth Circuit applied the same analysis to the duty of fair representation claim which it had approved of in *Wood* and applied in *Deringer*. The court focused on the nature of the remedy sought. The court found that relief of a legal nature was sought, and held that the Respondents were entitled to a jury trial. 881 F.2d at 289.

The instant case is wholly consistent with prior decisions of the Sixth Circuit regarding the right to a jury trial of a duty of fair representation claim in a hybrid Section 301 action. However, this is not a case in which legal and equitable

claims against a union and employer are hopelessly intermeshed. In this case, only the union's breach of duty is alleged, and the primary relief sought is legal in nature. Hence, this case raises legal and factual issues distinct from those raised in the context of a hybrid action, and adds nothing to the conflict in the circuits as to whether the right to a jury trial should obtain in *Terry*.

II.

AS THE APPELLATE COURT FOUND, THERE IS AMPLE EVIDENCE IN THE RECORD FROM WHICH REASONABLE MINDS COULD CONCLUDE THAT THE UTU BREACHED ITS DUTY OF FAIR REPRESENTATION.

Petitioner's second contention is that the appellate court erroneously decided that there was a submissible jury issue as to whether the duty of fair representation was breached in this case. The UTU maintains that even though the appellate court acknowledged the "wide

range of reasonableness UTU had in resolving the competing seniority claims of employees, reasonable minds on a jury would have come to the same conclusion as the district court, which found no duty on the part of the union had been breached. (Findings of Fact and Conclusions of Law and Judgment, Petitioner's App. at 24a). UTU, in other words, is asking this court to grant certiorari in order to weigh the evidence of record as to whether UTU would have been entitled to a directed verdict in the trial court. Clearly, this argument fails to meet any of the governing considerations for review on certiorari under Supreme Court Rule 17(1).

Moreover, the record overwhelmingly supports the appellate court's decision that there was a submissible jury issue. The record shows, *inter alia*, that various

officers and representatives of UTU did or failed to do the following:

a) totally disregarded their duty to obtain data on which to base plaintiffs' claim to a share of work in the merged system;

b) set up an arbitrary and impossible test for plaintiffs to meet as a condition of getting work in the merged system;

c) refused to allow representatives of Local 74 to attend meetings at which their claim to a share of work in the merged system was being discussed;

d) concealed from members of Local 74 the fact that their claim for yard work, as opposed to road work, was not even being negotiated during meetings from which they were excluded;

e) arbitrarily refused to follow recommendations of a union vice-president regarding how plaintiffs' claims could be fairly resolved; and

f) dismissed the union vice-president who made the foregoing recommendations from any further duties in the dispute and referred Local 74 back to the very general committee representative who had previously attempted to condition their claim to a share of work in the merged system on conditions which officers of the union had previously found were impossible to meet.

Clearly, therefore, the record supports the appellate court's conclusion that there was a submissible jury issue.

It is worth pointing out that, although this case came on for trial in February of 1986, the trial judge, Judge Walinski, for reasons which are not apparent from the

record, did not hand down a decision until July 29, 1988, almost two and a half years after the hearing. Whether this substantial lapse of time had a bearing on the court's recollections as to what the trial had demonstrated regarding the acts and omissions of UTU's officers and representatives can obviously be nothing more than a matter of conjecture. It does, however, seem fair to say that Judge Walinski's decision, unlike the decision of the appellate court, seems to all but ignore the overwhelming evidence of hostile and arbitrary conduct on the part of UTU which was developed at the trial. It was this evidence which caused the appellate court to conclude that UTU would not have been entitled to a directed verdict, and there is nothing in the record or in any of the cases cited by UTU in its petition for certiorari which is

inconsistent with the reasoning or decision of the appellate court.

III.

THE APPELLATE COURT FOUND SUFFICIENT EVIDENCE IN THE RECORD TO PRECLUDE A DIRECTED VERDICT IN THIS CASE ON THE ISSUE OF WHETHER IT WOULD BE FUTILE FOR LOCAL 74 TO PURSUE FURTHER INTERNAL REMEDIES.

Petitioner's final contention is that the Sixth Circuit incorrectly found that there was a submissible jury issue as to whether the union had taken a hostile position toward the Respondent at the time this suit was instituted, excusing Local 74 from the requirement of exhausting their internal union remedies. The general rule requires employees to exhaust internal union remedies before bringing suit against their union, if adequate remedies are available. *Clayton v. UAW*, 451 U.S. 679, 696 (1981). It is also a settled principle of law that futility is an adequate excuse for failure to exhaust

internal union remedies. *Glover v. St. Louis-San Francisco R.R. Co.*, 393 U.S. 324, 329 (1969). The Sixth Circuit recognizes that the excuse of futility can be established by proof that the position of the union is "hardened" or hostile toward the employee. *Geddes v. Chrysler Corp.* 608 F.2d 261, 265 (6th Cir. 1979). The Sixth Circuit in this case found that there was enough evidence in the record to preclude a directed verdict on the issue of whether the UTU had acted in a hostile manner toward Local 74 so that it would have been futile for Respondent to pursue further internal union remedies. 881 F.2d 286.

Petitioner suggests the fact that road workers from Local 74 were able to obtain work in the merged system is decisive proof that the union was not hostile toward the Respondent. However, it was that very fact which caused the Respondent to pursue

internal union remedies for six long years before bringing this action. *Id.* at 290. During that entire time it was never disputed that Local 74 members were entitled to their fair share of yard work under the union constitution. The appellate court found that there was ample evidence in the record to demonstrate that Local 74 may, therefore, have been misled by UTU officials about the course of negotiations regarding their dispute, and that procrastination on the part of union officials regarding the yard work dispute, prevented Respondent from being able to obtain the necessary data to establish their claim for work. *Id.*

After years of delay, Respondent was told that in order to obtain any yard work, they must identify specific trains that were diverted from the Marion yard facility to other switching facilities in the

Conrail system. Even after the UTU Board of Appeals rendered a decision in 1979, acknowledging that this task was impossible due to the passage of time, the union officials continued to insist that no work would be granted absent identification of specific diverted trains. *Id.* The Sixth Circuit found that requiring Local 74 to perform a task which was made impossible by the union's own footdragging, constituted the sort of hostile situation which, if proven, would render any further pursuit of internal union remedies futile. *Id.* Clearly, upon this evidence in the record, other reasonable minds could come to the same conclusion.

CONCLUSION

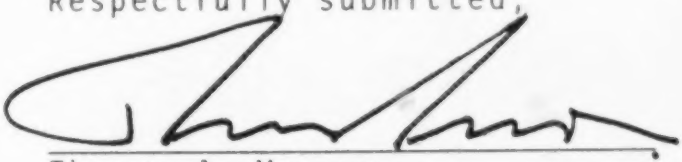
This Court should deny the Petition for Writ of Certiorari because the instant case presents the issue of whether there is a right to a jury trial in a pure duty of

fair representation case, which is not the issue presented to the Court in *Terry*. The conflict in the circuits, referred to by the Petitioner, presents the issue of whether or not a hybrid Section 301 action should be characterized overall as legal or equitable in nature.

A hybrid action is unique because it combines claims that are legal and equitable in nature, and the issue presented by the courts in conflict is whether the overall characterization of the hybrid action is necessary in order to serve the labor law policies of uniformity and predictability. While Petitioner would argue that the constitutional right to a jury trial outweighs these underlying policies of labor law, this case does not require the Court to balance those concerns. This case adds nothing to the conflict in the circuits and has been

decided by the appellate court applying well established principles of law set forth by this Court and the Sixth Circuit.

Respectfully submitted,



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CERTIFICATION

This is to certify that three copies of the foregoing Respondent's Brief in Opposition were served on February 9, 1990 by First Class U.S. Mail, postage prepaid, upon the following counsel of record:

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